BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
GTE Telephone Operating Companies	)	CC Docket No. 98-79
GTOC FCC Tariff No. 1	)	
GTOC Transmittal No. 1148	)	

REBUTTAL OF GTE

R. Michael Senkowski
Gregory J. Vogt
Bryan N. Tramont
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

John F. Raposa
GTE SERVICE CORPORATION
600 Hidden Ridge
HQE03J27
Irving, Texas 75038
(972) 718-6969

Gail L. Polivy
GTE SERVICE CORPORATION
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5214

THEIR ATTORNEYS

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SUMMARY

In this Rebuttal, GTE responds to comments filed in response to its ADSL Direct Case. Despite commenters efforts to distract the Commission from the issues designated for investigation, the fundamental conclusion remains that GTE's ADSL offering is a jurisdictionally interstate service based on: (1) long-standing Commission and court precedent requiring an end-to-end analysis of the totality of the communication in order to determine its jurisdictional character, (2) the technical infeasibility of separating Internet traffic into jurisdictional parts, and (3) the application of the inseparability doctrine.

First, the commenting parties fail to point to any compelling reason for abandoning fifty years of communications law precedent requiring an end-to-end analysis of a communication to assess its jurisdictional nature. Commenters argue that GTE's ADSL "telecommunications service" ends at the ISP where "information services" begin. Yet the Commission's *Memory Call* decision rejected a two-call approach despite the involvement of the enhanced messaging service. Other commenters suggest that the call "terminates" at the ISP based on the Commission's reciprocal compensation definition. Yet the "terminates" language does not alter jurisdiction, particularly in light precedent that has rejected this approach where an initial local call was the first step in an interstate communication. Finally, some opponents contend that the physical location of the ADSL service mandates a state tariffing approach. However, every court that has considered this matter has emphasized that the nature of the communication is determinative of jurisdiction rather than the physical location of the facilities used. In short, each of these two call theories have been repeatedly

rejected. In an effort to escape these conclusions, some commenters argue that states should tariff ADSL on policy grounds. Yet policy considerations do not, and cannot, alter jurisdiction.

Second, GTE's ADSL service traffic cannot be subdivided into jurisdictional parts. The record clearly demonstrates that Internet technology simply does not permit an analysis of the underlying traffic based on the geographic location of the customers. The commenters do not offer any evidence to contradict this fact. In light of this technological limitation, the Commission should apply its inseparability doctrine to exercise jurisdiction over this service. In any event, GTE's ADSL service clearly satisfies the ten percent interstate threshold established for federal jurisdiction of analogous special access services.

Regulation of GTE's ADSL offering as an interstate service is completely consistent with the Commission's prior treatment of ISPs and the Internet. The Commission has repeatedly described ISP traffic as interstate and there is no basis for altering that conclusion now. In fact, the switched access charge exemption would not have been necessary if Internet communications were not interstate in nature.

As to the issue of a price squeeze, the original proponent of this theory, Northpoint, now claims that this issue does not justify state tariffing. Moreover, as set forth in GTE's Direct Case, the entire price squeeze theory is based on the flawed premise that state and federal regulators cannot perform their respective tasks.

The FCC designated only two issues in this proceeding: (1) "whether GTE's DSL service offering is a jurisdictionally interstate service" that should be tariffed at the federal level and (2) "whether the Commission should defer to the states the tariffing of

retail DSL services in order to lessen the possibility of a price squeeze." Despite the focused nature of this inquiry, the commenting parties expend considerable energy attempting to divert the Commission's attention to other matters. These diversionary tactics seem to be a concession to the weakness of these commenters' arguments on the designated issues. The Commission should not permit the fog generated by these non-designated to obscure the answers to the designated questions: ADSL service is properly tariffed at the federal level and such a designation does not enhance the possibility of a price squeeze.

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REBUTTAL OF GTE

GTE Service Corporation and its affiliated domestic telephone operating companies (collectively, "GTE"),[1] pursuant to Section 204(a) of the Communications Act and the Order Designating Issues for Investigation,[2] hereby files its Rebuttal in the above-referenced matter.

The FCC designated only two issues in this proceeding: (1) "whether GTE's DSL service offering is a jurisdictionally interstate service" that should be tariffed at the federal level and (2) "whether the Commission should defer to the states the tariffing of retail DSL services in order to lessen the possibility of a price squeeze."[3] Despite the

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1 GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc.

2 *GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Transmittal No. 1148*, Order Designating Issues for Investigation, CC Docket No. 98-79 (CCB August 20, 1998) ("*Designation Order*").

3 Designation Order at ¶ 12.

focused nature of this inquiry, the commenting parties expend considerable energy attempting to divert the Commission's attention to other matters. These diversionary tactics seem to be a concession to the weakness of these commenters' arguments on the designated issues. The Commission has available a wide array of procedural tools and pending dockets that, to the extent necessary, can address these non-designated issues. However, the Commission should not permit the opposing parties to undermine the discrete nature of the designation order.

Once the chaff is removed, the fundamental conclusion remains that GTE's ADSL service is interstate based on: (1) longstanding Commission and court precedent requiring an end-to-end analysis of the totality of the communication, (2) the technical infeasibility of separating Internet traffic into jurisdictional parts, and (3) the application of the inseparability doctrine. This conclusion is completely consistent with the Commission's prior treatment of ISPs and the Internet. As to the issue of a price squeeze, the original proponent of this theory, Northpoint, now claims that this issue does not justify state tariffing. Moreover, as set forth in GTE's Direct Case, the entire price squeeze theory is based on the flawed premise that state and federal regulators cannot perform their respective tasks.

I. ADSL Service Must Be Analyzed Based on the Totality of the End-to-End Communication

As many commenters agree,[4] the Commission and the courts have uniformly held that it is the nature of the end-to-end communication that determines jurisdiction,

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[4] Bell Atlantic at 5; USTA at 3; Ameritech at 5-9; US West at 1-2; Southwestern (Continued...)

not what technology is used, where the equipment is located, or who procured any intermediate piece of the network.[5] The federal appellate courts and the FCC have applied this jurisdictional determination across a wide variety of services and have consistently rejected efforts to segment communications into multiple piece parts, regardless of whether multiple services are involved or whether another carrier's or an end user's equipment is utilized in the communication.[6] As set out in GTE's Direct Case, this precedent is consistent and extensive.[7]

Rather than tackle this precedent straight on, opponents of GTE's tariff attempt to limit artificially the application of the end-to-end doctrine. In furtherance of this effort, commenting parties urge the Commission to apply irrelevant regulatory classifications to alter this long-standing jurisdictional analysis. However, these regulatory

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(...Continued)
Bell, Pacific Bell, Nevada Bell at 2.

5 See e.g. *United States v. AT&T*, 57 F. Supp. 451, 453-5 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945); *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984) ("NARUC"); *General Tel. Co. of California v. FCC*, 413 F.2d 390, 397 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888; *see also Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 699 (1st Cir. 1977).

6 *See Southwestern Bell Telephone Company*, 3 FCC Rcd 2339, 2341 (1988) ("[s]witching at the credit card switch is an intermediate step in a single end-to-end communication" and thus the jurisdictional nature of the call would be determined by the totality of the underlying communication, not the credit card validation call.); see also *Long Distance/USA, Inc. v. Bell Tel. Co. of Pa.*, 10 FCC Rcd 1634, 1636-37 (1995); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd 1619, 1621 (1992).

7 GTE Direct Case at 7-15.

classifications are tools to develop policy only *after* jurisdiction is established.[8] There is only one test of jurisdiction: the nature of the totality of the end-to-end communication. No commenting party has pointed to a single precedent establishing an alternative test for Commission jurisdiction. Indeed, they cannot because no such precedent exists.

Opponents make three basic arguments in support of a two-call theory: (1) that the nature of the two services (information and telecommunications) in the end-to-end ADSL communication breaks the communication into two parts for jurisdictional purposes, (2) that an initial telecommunications call "terminates" at the ISP point of presence, therefore creating two jurisdictionally distinct calls, and (3) that ADSL is just another loop service like ISDN, and should therefore be tariffed at the state level. Other commenters rely on various "policy" arguments in favor of state jurisdiction. However, these policy issues cannot alter jurisdiction. All of these arguments, like those that opponents of federal jurisdiction have been making for the past fifty years, should be rejected.

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[8] For example, some commenters cite to the language of ¶ 36 of the *Advanced Services NPRM (Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, CCB/CPD No. 98-15, RM 9244 (rel. August 7, 1998)) in support of the two services analysis. ICG at 6; MCI at 18-19. Paragraph 36, in discussing whether advanced services are telecommunications services, states that "[a]n end user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately . . . ." This distinction, however, simply does not impact the jurisdictional analysis and nothing in the Order indicates otherwise.

A. The Use of Telecommunications and Information Services Does Not Alter The End-to-End Jurisdictional Analysis

The most common effort to resurrect the long-rejected two call approach is that the end-to-end analysis only applies to the telecommunications service portion of the call.[9] The proponents of this argument posit that because the ISP provides an information service, the "end" of the telecommunications transmission is the ISP's point of presence ("POP").[10] Therefore, both "ends" – the customer and the ISP POP – are intrastate. The Commission and courts have rejected this oft-recycled argument that different component services create "breaks" in the end-to-end communication.

In *Memory Call*, the Commission rejected the two-call theory despite the fact that two types of services were involved in the end-to-end communication.[11] Memory Call's voice mail service was clearly an enhanced service, while the initial connection between the calling party and the busy or unanswered phone could be characterized as a telecommunications service. Georgia asserted jurisdiction over what it argued was the intrastate enhanced service between the local switch and the voice mail apparatus. Bell South countered that, in evaluating jurisdiction, it was the totality of the end-to-end

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9 Hyperion at 8-9; ITC at 3-5; Focal at 3-5; Splitrock at 2-3; ICG at 3-5; WA at 2-5; MCI at 18-19; ALTS at 5-6, 15-17.

10 In a variation on this argument, CompTel at 4 argues that ADSL only relates to the telecommunications service portion of the call, therefore the physical ends of ADSL are the "ends" for jurisdictional purposes. However, "[t]he dividing line between the regulatory jurisdictions of the FCC and states depends on "the nature of the communications which pass through the facilities [and not on] the physical location of the lines." *NARUC*, 746 F.2d at 1499.

11 *Petition for Emergency Relief and Declaratory Ruling of BellSouth Corp.*, 7 FCC Rcd at 1619, 1620 (1992) (*"Memory Call"*).

communication that was relevant. Thus, its service was jurisdictionally mixed because callers left voice mail messages both on an intra- and inter-state basis.

The Commission rejected Georgia's argument that would have "artificially terminate[d] our jurisdiction at the local switch and ignore the 'forwarding and delivery of [the] communications' to the 'instrumentalities, facilities, apparatus and services' that comprise BellSouth's voice mail service."[12] The Commission went on to stress that "[o]ur jurisdiction does not end at the local switch but continues to the *ultimate* termination of the call . . . ."[13] In short, despite the involvement of multiple services, the Commission still is required to look at the totality of the communication.

PacWest, in a related argument, contends that the end-to-end analysis only applies to common carrier services, therefore, the customer call ends at the ISP where the non-common carrier information services begin.[14] As set out above, the *Memory Call* case also involves non-common carrier enhanced services and still applied the end-to-end analysis to the totality of the communication. Similarly in *General Telephone Company of California v. FCC*, the court held that common carrier services within California were part of a larger end-to-end communication which included the

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12 *Id.* at ¶ 11.

13 *Id.* (emphasis added).

14 PacWest at 3; In an odd twist, ALTS argues that if Commission decides to "claim" jurisdiction over ADSL, it should rely on its general authority over information services. ALTS at 16. Yet there is no need for the Commission to "claim" jurisdiction based on an attenuated argument about the types of services used. Rather, in a straightforward application of its long-standing jurisdictional test, ADSL is properly tariffed at the federal level.

broadcast transmissions of out-of-state stations.[15] As evidenced by these cases, the different services theory, if accepted, would eliminate vast portions of the Commission's jurisdiction.[16] Such a jurisdictional revolution should not be contemplated.[17]

As Time Warner puts it, where a connection between an end user and an ISP (a telecommunications service) is subsequently carried by the ISP on to the Internet across state lines (an information service), the telecommunications and the information service components are considered parts of an interstate communication . . . for jurisdictional purposes."[18] Nothing in fifty years of communications evolution has altered the bedrock strength of this end-to-end doctrine.[19] Nothing filed in this proceeding justifies reaching a different result here.

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15 *General Tel. Co. of California v. FCC*, 413 F.2d 390, 401 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888; *see also Idaho Microwave, Inc. v. FCC*, 352 F.2d 729, 732 (D.C. Cir. 1965) (microwave facilities in state, broadcast signals interstate); *California Interstate Tel. Co. v. FCC*, 328 F.2d 556 (D.C. Cir. 1964)(broadcast transmission in state and satellite used for interstate).

16 For example, every long distance call involves both inter- and intra-state components, often provided by different carriers. Nonetheless, it is the totality of the end-to-end communication that establishes jurisdiction, not the components.

17 The Ohio PUC makes a similar argument that the first call "ends" because the ISP "portion" of the call is over a "private" network. Ohio at 2-6. This argument must also fail. The "leaky PBX" case clearly applies an end-to-end analysis despite the involvement of an end user's private PBX network. *See MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 868-70 (1983).

18 Time Warner at 3-4 (citing *Memory Call*); see also Covad 3-6.

19 See *United States v. AT&T*, 57 F. Supp. 451, 453-5 (S.D.N.Y. 1944), *aff'd,* 325 U.S. 837 (1945).

B. The End-to-End Communication Does Not Terminate at the ISP

In another effort to resuscitate the two-call approach, Hyperion argues that the Commission's definition of "termination" for reciprocal compensation purposes under Section 251(b)(5) mandates that a call "terminates" when reaching the ISP point of presence.[20] Hyperion is grasping at straws. The definition of "termination" is only relevant for purposes of determining the costs to be recovered for reciprocal compensation, not for establishing the jurisdiction of a communication. The Commission has repeatedly held that an initial local call that is the first step in an interstate communication simply does not "terminate" the communication for jurisdictional purposes.[21] It should also be noted that even Section 251(b)(5)'s termination definition encompasses all of the facilities from the terminating carrier's end office switch to the ultimate destination of the called party, and not simply the first point at which the call is handed off to the terminating carrier. 47 U.S.C. § 251(b)(5).[22]

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20 Hyperion at 8.

21 *See Southwestern Bell Tel. Co.*, 3 FCC Rcd 2339, 2341 (1988); *Long Distance/USA, Inc. v. Bell Tel. Co. of Pa.*, 10 FCC Rcd 1634, 1636-37 (1995); *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 868-870 (1983).

22 Similarly, Focal at 5 suggests that ADSL traffic is not interstate because all interstate carriers must contribute to universal service and ISPs are not required to do so. Here too the failure to designate ISPs as interexchange carriers liable for universal service contributions is simply a recognition that the ISP is not a telecommunications carrier; it is not a conclusion that the jurisdictional nature of the traffic is intrastate.

C. The Physical Location of the Facility is Irrelevant in Determining Jurisdiction

Opponents of a federal tariff also suggest that ADSL services should be tariffed at the state level because, like ISDN and dedicated lines, ADSL provides local loop capability.[23] First, it is important to remember that carriers tariff services, not facilities.[24] Therefore, the Commission should not allow itself to be manipulated into relying on the location of ADSL facilities as the basis for its jurisdiction. Rather, "[e]very court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used."[25] Second, what distinguishes ADSL from ISDN or dedicated offerings is that GTE believes dedicated ADSL will be overwhelmingly used to provide interstate Internet access.[26] Therefore, the "jurisdictional mix" of ADSL traffic is generally known and, in any event, inseparable. Conversely, ISDN and local service offerings are used for a variety of traffic from both

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23 *See* CompTel at 4; Hyperion at 6; AT&T 2-5; ITC 5-7; WA at 6; ISP/C at 4-5; ALTS at 6.

24 Thus GST's argument at 9 that this service must be state tariffed because its UNEs are state tariffed also must fail. This rationale would move virtually all services into the state jurisdiction. Similarly, basing jurisdiction on the jurisdiction of "functionally equivalent" equipment, as Washington at 6 does, also improperly ignores the end-to-end nature of underlying service.

25 *See NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (citations omitted)).

26 AT&T at 5 argues that "it is entirely possible, if not likely, that future xDSL technologies will incorporate 'IP voice' capability within the data stream, and eliminate the need for a separate circuit switched path" and ultimately ". . . place all of the customer's loop services, . . . under a federal access tariff . . . ." Jurisdiction cannot be determined based on what might happen in the future. AT&T, in essence, is arguing that ADSL should be regulated incorrectly now on the chance that one day technology will make the decision appropriate.

jurisdictions and may, indeed, be separable. Thus, different regulatory treatment for ADSL is based on the distinct factual characteristics of this service and the analogies with ISP access through local services are inapposite.

In a related argument, Hyperion argues that tariffing the local loop at the state level and ADSL at the federal level will run the risk of creating a mismatch between costs and revenues. It therefore argues that all tariffing of ADSL should be at the state level.[27] Hyperion is apparently raising this argument in the hopes of convincing the FCC to force ADSL to be tariffed with the states using the no "mix and match" policy of ONA. This analogy is inappropriate. ADSL is priced based only on the additional costs of providing the ADSL functionality and therefore a mismatch of cost and revenues is not a significant issue.[28] In sum, federal ADSL tariffing is consistent with the Commission's treatment of other loop related services and facilities.[29]

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27 Hyperion at 7.

28 GTE developed its prices based on the forward-looking costs of this service. Apparently, however, some have erroneously interpreted this description and justification information as indicating how these costs would be allocated in the jurisdictional separations process. GTE did not intend to open the tariff to this interpretation. When GTE is required to book these expenses, the appropriate accounting procedures will be used to insure that the proper jurisdictional assignment is made.

29 Many commenters point to the twenty or so state commission interconnection decisions and a couple of federal district court decisions reviewing these Commission decisions for the proposition that access to the Internet is local. GTE notes that many of these cases turned on the specific contract language of the interconnection agreements at issue and many indicated that a FCC decision on the jurisdictional issue would alter their analysis. See Ameritech at Exhibit A. To the extent these decisions failed to apply an end-to-end jurisdictional analysis, they are wrong and should be rejected.

D. "Policy" Concerns Cannot Alter Jurisdiction

Several parties make "policy" arguments why the FCC should force carriers to tariff an interstate service at the state level, apparently because they lack adequate "legal" arguments to justify such a result. These arguments include: (1) states are better able to protect consumers or promote competition than the FCC;[30] (2) state tariffing ensures regulatory neutrality with existing intrastate access methods;[31] and (3) state tariffing protects consumer expectations that they access their ISPs through state tariffed services.[32] The FCC should not fall for these insubstantial arguments. First, "policy" reasons cannot trump fifty years of legal precedent. Second, it is ludicrous to conclude that the FCC cannot protect consumers or competition. Third, the place where a tariff is filed has nothing to do with making sure that different access methods receive no undue preferences. Finally, consumers generally have no idea where services are tariffed; therefore, there are no customer expectations to be protected. Federal tariffing is good policy not just because that is what the law dictates, but also because it insures that access services policy will be applied consistently throughout the country.

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30 *See* NARUC at 5-6.

31 *See* AOL at 9; MCI at 12-15; RCN at 8; Ohio at 5-6; Intermedia and e*spire at 7.

32 WA at 5-6.

II. GTE's ADSL Traffic Cannot Be Divided Into Jurisdictional Components

Under the end-to-end jurisdictional analysis, the next task is to evaluate the interstate or intrastate nature of the subject traffic. As set out in GTE's Direct Case, and echoed by other commenters,[33] the traffic carried over an Internet access arrangement cannot be jurisdictionally segregated as a technical matter because "Internet routers have . . . not been designed to record sufficient data about packets to support jurisdictional segregation of traffic."[34] Similarly, the Eighth Circuit's access charge decision, in holding that ISP traffic is "jurisdictionally mixed," found that the "FCC cannot . . . even determine what percentage of the overall ISP traffic is interstate or intrastate."[35] No party presented any evidence to contradict these facts.[36] Absent the

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33 USTA at 5-6; Bell Atlantic at 3-5; AOL at 6; Covad at 3-4.

34 Kevin Werbach, *Digital Tornado: The Internet and Telecomunications Policy,* OPP Working Paper No. 29, at 45 (Mar. 1997) *("Digital Tornado").* As a practical matter, the jurisdiction of the origination and termination points of ADSL cannot be analyzed. In a typical Internet session, the termination point changes every time an end user enters or clicks on a URL. For example, in single session, an end user connected to America OnLine in California might start with America OnLine's homepage (which may be hosted on machines physically located in Virginia even though America OnLine's POP is in California), move to the FCC's web site, then to Infoseek's web site (for searching the Internet) and then to the Amazon.com's web site. Unlike a telephone call with fixed origination and termination points, the termination points of an Internet session changes throughout the session. In addition, since ADSL is an "always-on" service, an ISP customer can receive communications from a variety sources and jurisdictions without initiating a call. For example, the origination of communications may be predominately interstate among ISP customers who use ADSL to connect to their ISP and subscribe to the push-type business news and stock quotes from PointCast.

35 *Southwestern Bell Telephone Co. v. FCC*, Case No. 97-2618, slip op. at 41 (8th Cir. Aug. 19, 1998) (*"Southwestern Bell Decision"*).

ability to segregate this Internet traffic, there is no basis for a broad finding that a dedicated access service carrying this traffic – such as an ADSL offering – is anything but an interstate service.

III. Under the Inseparability Doctrine, GTE's ADSL Service is Properly Tariffed at the Federal Level

The final piece in the analytical framework for ADSL jurisdiction is the application of the "inseparability doctrine." Under the doctrine, states "must stand aside when, as here, it is technically and practicably impossible to separate the two types of communications [interstate and intrastate] for tariff purposes."[37] The doctrine also requires the Commission to demonstrate that state regulation over intrastate service would thwart or impede the Commission's exercise of its lawful authority over interstate

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(...Continued)

36 GST at 5 argues that GTE has failed to carry its burden regarding the jurisdictional mix of this traffic. *See also* Intermedia and e.spire at 4; ALTS at 20 (GTE has failed to show that "quantification is so impractical as to require application of the inseparability doctrine"). GTE notes that as a new service no traffic information could have been made available. In its Direct Case, GTE submitted information regarding the location of many popular Internet destinations. There is every reason to expect that GTE's ADSL traffic will substantially reflect this current Internet traffic and, therefore, it is inescapable that a significant portion of ADSL Internet traffic will be interstate. GTE supported this further by affidavit in its Direct Case at 17 stating that it knows of no method of distinguishing and measuring this traffic. Although some commenters appear to doubt the facts attested to by GTE, the Eighth Circuit and the OPP Working Paper, they offer no methodology for quantification of this data, nor does one exist.

37 *Amendments of Part 2 and 22 of the Commission's Rules*, 93 FCC 2d 908, 922 (1983), *aff'd mem.*, *NARUC v. FCC*, 725 F.2d 125 (D.C. Cir. 1984).

communications services.[38] Here, it is technically impossible or impractical to segregate services between inter- and intra-state jurisdictions and state regulation would impede federal goals, therefore federal regulation is appropriate.[39] Federal regulation also prevents the patchwork regulatory regime that may result from state regulation of these services. As Covad points out, "[s]tate regulation . . . could impede the nation-wide deployment of DSL service. The States have little experience in regulating advanced telecommunications services."[40] Therefore federal tariffing is appropriate for ADSL under the inseparability doctrine.[41]

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38 *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

39 *See e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986); *see also California v. FCC,* 39 F.3d 919, 931-33 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995); *Pub. Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1331-34 (D.C. Cir. 1989), *See also Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198, 215 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied,* 434 U.S. 874 (1977).

40 Covad at 9.

41 RCN's comments misconceive the nature of the inseparability doctrine. RCN argues that "if a particular service is jurisdictionally mixed, the FCC *must* let the states regulate the intrastate component of the service." RCN at 6-7 (emphasis added). The inseparability doctrine holds exactly the contrary. When, as here, the intrastate traffic cannot be jurisdictionally separated and state regulation thwarts federal goals, federal regulation is appropriate. *See e.g. Mobile Telecommunications Technologies Corp.*, 6 FCC Rcd 1938, 1939 (CCB 1991), *aff'd*, 7 FCC Rcd 4061 (1992).

GTE's ADSL service traffic also vastly exceeds the ten percent threshold set for interstate regulation of analogous special access services.[42] ALTS asserts that this ten percent special access rule should not apply because "[t]he Joint Board has not recommended that these calls be treated as interstate . . ." and " . . . none of the ILEC's DSL tariffs permit customers to certify whether 10% or more of the underlying traffic is actually interstate."[43] ALTS' assertions are spurious. First, GTE only argued that ADSL was reasonably "analogous" to the special access traffic subject to the ten percent threshold, not that it directly applied. Second, the presence or lack of a Joint Board recommendation is irrelevant since the rationale for applying the ten percent rule is equally persuasive in the context of ADSL services. Third, GTE expects to ask every customer to certify that ten percent or more of its traffic is interstate. Therefore, any ALTS' concerns about verification should be assuaged.[44]

Finally, as with all services, GTE will tariff ADSL based on the jurisdictional nature of the underlying end-to-end traffic.[45] If such traffic warrants state tariffing, GTE

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42 *MTS and WATS Market Structure*, Decision and Order, 4 FCC Rcd 5660 (1989) (setting ten percent threshold).

43 ALTS at 19-20.

44 AOL suggests that the Commission has allowed states to tariff "other local services used in connection with both interstate and intrastate traffic." AOL at 9. Yet the Commission has not done so when, as here, the vast majority of the traffic is interstate and jurisdictional separation is not possible.

45 GTE Direct Case at 4, n.10.

will do so.[46] Therefore, commenters who suggest that GTE has claimed ADSL must be tariffed solely at the federal level are simply mistaken.[47]

IV. Federal Tariffing of GTE's Access Service is Consistent with The Commission's Prior Treatment of ISPs and the Internet

Federal tariffing of ADSL is also consistent with prior FCC decisions regarding ISPs and the Internet. Commenters efforts to use stray language from various court and Commission decisions to bolster their case do not withstand closer scrutiny. Federal tariffing is also consistent with the access charge exemption and ISPs' designation as "end users" for that limited purpose. In addition, under the clear definition of "access services" contained in Part 69, GTE's ADSL service is a properly tariffed federal access service.

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46 Some commenters note that US West has tariffed its ADSL service differently. *See* AT&T at 4; WA at 2. Specifically, it is GTE's understanding that US West requires both the customer and the ISP to purchase an ADSL service and has tariffed the customer ADSL service at the state level. As a business matter, GTE does not require that ADSL service be broken apart into two separate transactions, one with the ISP and one with the customer. However, as US West notes, "US West's decision should not affect the Commission's determination of the appropriate regulatory treatment of DSL services under the Communications Act, and does not change the fact that much of the traffic originated and terminated over such services is interstate in nature." US West at 2. Indeed, while GTE noted in its Direct case at ___ that its ADSL service is primarily marketed to ISPs, this was not to suggest any limitation on marketing to end users – either by GTE's ISP customers or GTE itself. Since no use or user restrictions may exist, GTE is prepared to provision its ADSL service to end users which certify the interstate nature of their use (*e.g.*, through connectivity to an ISP) and reserves the right to market the same.

47 *See e.g.* RCN at 9.

A. The Commission Has Consistently Described ISP Traffic as Interstate

As set out in the Direct Case, the Commission has long labeled ISP traffic as interstate.[48] As an initial matter, GTE notes that ALTS attempts to marginalize these prior Commission decisions. ALTS claims these cites are "vague references" to "a hodgepodge of inexact phrases culled from hundreds of Commission pages issued over two decades."[49] ALTS' rhetoric cannot alter the fifteen years of Commission decisions describing ISP traffic as "interstate." Apparently ALTS would have us believe that the Commission has been consistently "inexact" in carelessly describing ISP traffic as "interstate". ALTS efforts to sweep aside these decisions should not be countenanced.

Some commenters have gone to great lengths in scouring Commission and court decisions for the slightest hint that this traffic is intrastate. Those references are not persuasive.[50] For example, the tariff opponents invoke a footnote in the Eighth Circuit's

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48 *See MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 711-15 (1983); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305, 4306 (1987); *In re Access Charge Reform*, 11 FCC Rcd 21354, 21478 (1996); *First Report and Order Concerning Access Charge Reform*, CC Docket No. 96-262, 12 FCC Rcd 15982, 16132 (1997) ("Access Charge Reform Order"); *Federal-State Joint Board on Universal Service,* Report to Congress, CC Docket No. 96-45, at 52 (April 10, 1998).

49 ALTS at 6.

50 ALTS at n.13 points to GTE's position in the Separations Docket as an indication that GTE supports tariffing ADSL at the state level. Yet as ALTS is well aware the Joint Board has not yet adopted GTE's proposal. If and when the Joint Board and the Commission alter their separations approach, GTE's federal ADSL tariff may need to be revisited. In the interim, GTE's tariff is properly filed at the

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access charge decision for the proposition that ADSL service is a "local call."[51] The Court's reference to "local calls" was intended to illustrate that ISPs "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed . . . access charges."[52] The full footnote states:

> ISPs subscribe to LEC facilities in order to receive local calls from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long distance call that the IXC sells as its product to its own customers.

Thus, even the footnote itself notes the usual interstate nature of ISP traffic. In addition, the purpose of the footnote is to describe the differences between IXC and ISP use of local networks – not to make any determination about the jurisdictional nature of ADSL calls. The court had to accept that ISP calls were interstate in the first instance, since without this factual underpinning, no exemption from federal access changes would even be appropriate. The Commission should not accept the invitation to scrape the bottom of this barrel in order to find a reversal of fifty years of precedent mandating an end-to-end jurisdictional evaluation of such communications. [53]

(...Continued)
federal level under the current regulatory regime.

[51] Splitrock at 3; ICG at 5; CompTel at 4-5 (citing *Southwestern Bell Decision* at 39 n.9).

[52] *Southwestern Bell Decision* at 39.

[53] Similarly ALTS at 21 quotes the *Southwestern Bell Decision* for the proposition that "at least some ISP services are purely intrastate and not susceptible to FCC regulation." *Southwestern Bell Decision* at 41. Yet the same passage that contains this quote also points out that ISP traffic is "jurisdictionally mixed" and "it may be impractical if not impossible to separate the two elements [inter and
(Continued...)

B. Federal Tariffing of ADSL is Consistent With the Commission's Access Charge Decisions

Many commenters also voice concern that federal tariffing of ADSL would undermine the existing access charge exemption for ESPs.[54] GTE's ADSL offering in no way constricts the continuing ability of any ISP to obtain access to the local exchange using state-tariffed business lines for end-user "dial up" business. The ISP exemption was first articulated in the Commission's 1983 *Access Charge Reconsideration Order*.[55] In that decision, the Commission held that for an interim period (which remains in effect), the agency preserved the ability of ISPs to obtain access using state-tariffed business lines rather than paying interstate switched access charges.[56] The Commission did not, however, either explicitly or implicitly, hold that

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intrastate]." These factors actually support federal jurisdiction under the inseparability doctrine. Moreover, the mere existence of some purely intrastate ISP services does not undermine the appropriateness of filing this tariff for interstate applications.

54 LTS 10-12; CIEA at 3; AOL at 11.

55 *TS and WATS Market Structure*, 97 F.C.C.2d 682 (1983).

56 *d.* at 715 ("[w]ere we at the outset to impose full carrier usage charges on enhanced service providers . . . who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.") Notably, GTE's filing in no way implicates the policy concerns underlying the ESP exemption. As the *Access Charge Reconsideration Order* made clear, the Commission thought that imposing *usage-sensitive* access charges on ISPs could produce rate shock. GTE's offering does not affect their ability to continue to avoid switched access charges.

such entities were immune from *all* access-related charges if they choose to access the interstate network through alternative means.[57]

Some commenters argue that GTE's tariff is discriminatory because it requires ISPs to pay access charges in order to utilize ADSL.[58] This analysis misses the mark. First, as stated previously, the access charge exemption is an exemption from *switched* access charges. And it is these switched access charges that still contain some subsidy elements.[59] In contrast, ADSL is a dedicated service, not a switched service. Therefore under no circumstances will ISPs purchasing ADSL be subject to the switched access charges to which the exemption applies. The Commission has never determined that charges for dedicated access services, like ADSL, contain subsidy elements; indeed, these dedicated access prices have generally been based on costs.[60] Thus, GTE must be compensated for providing the additional ADSL functionality.

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57 Time Warner at 7 n.14 asserts that "where the FCC has stated that access charges do not apply, it has also determined that reciprocal compensation does apply." Yet Time Warner does not cite to any FCC decisions establishing this binary regulatory structure, nor are there any. To the extent that Time Warner's analysis holds any weight, however, the fact that ISPs would be subject to access charges, but for the exemption, places these services firmly in the interstate camp.

58 *See* Intermedia and e.spire at 4; ISP/C at 11.

59 *Access Charge Reform Order* at 16133-16135.

60 *Cf.* Time Warner at 7, n.13 (arguing dedicated access may be priced too low and citing *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154 at ¶ 171 (1994)).